

Authorizing Matters

Policy Brief

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Authorizers, Charter Schools and AYP Accountability

About this Policy Brief

This NCLB Policy Brief examines authorizer obligations in NCLB implementation. Those new to the authorizing role will gain understanding of how “typical” authorizing responsibilities intersect with NCLB accountability. Furthermore, experienced authorizers can use this Brief to spot-check whether their practices are in fact fulfilling the various NCLB-related obligations for which they are responsible.

The federal No Child Left Behind Act (NCLB or the Act) has many facets: as the most recent incarnation of the very broad Elementary and Secondary Education Act, it touches on such diverse topics as student assessment, teacher credentialing, gifted education and native Hawaiian instruction. But the heart of NCLB lies in accountability. More specifically, it focuses on accountability for raising student achievement, especially for groups of students who, historically, are most likely to be left behind.

NCLB requires that all students achieve proficiency by the 2013 – 2014 school year. To meet this ambitious goal, schools and districts are required to make adequate yearly progress (AYP) towards proficiency. Schools and districts that receive NCLB funding (through its Title I component) are held accountable if aggregate student scores, or those for any of the identified subgroups¹, fall below AYP targets. When they fall short, those receiving Title I funds are subject to an increasingly aggressive set of corrective measures. Those measures range from relatively modest interventions such as the requirement that an underperforming school allow transfers to other schools in the same district, to a full-blown state takeover or the reconfiguration of a school.

Although charter schools are freed under state law from many of the local and statewide requirements applicable to other public schools, charter schools are not exempt from federal law. That means that all charters must comply with NCLB, including its AYP requirements. In ensuring NCLB compliance, the charter school authorizer, the governmental or non-profit entity empowered under state law to approve and oversee a charter school, then plays a central role.

This Policy Brief takes a close look at one expression of AYP accountability – the expectations and responsibilities it places on charter school authorizers. It explores the ways in which NCLB impacts the oversight role of authorizers and recommends actions charter school authorizers can take to meet their NCLB obligations and, most importantly, support schools in reaching the worthy goal of proficiency for all students.

A Quick Look at the Stages of AYP Accountability

A failure of the overall student population or of a subgroup to make AYP for two consecutive years triggers AYP accountability for schools receiving Title I funding². According to federal law, such schools must

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be designated as a “School In Need of Improvement” and take a series of specific actions to improve the academic performance of its students. As the number of consecutive years that a school does not meet AYP targets increases, so does the severity of the consequences that the school faces.



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THE 411 ON TITLE I

Title I provides schools with additional funding for educating students from low-income families. There are two types of programs to which Title I can be applied:

- A **Targeted Assistance** program requires Title I funding to be carefully targeted to benefit only those students that are eligible (according to a federal formula) for Title I aid. Schools where less than 40% of students meet the Title I eligibility threshold are considered to have a Targeted Assistance program.
- Schools over the 40% Title I eligibility threshold do not need to track these funds by student because the volume of needy children is so high that funds can be spent on a school-wide basis. Thus, these schools are considered to have a **School-Wide** program.

For purposes of NCLB accountability, a school is considered a “Title I school” if it has either a Targeted Assistance or School-Wide Program.

Authorizers play a critical role in ensuring charter schools designated as a “School In Need of Improvement” implement the consequences required by federal law (See *Authorizer Checklist: Implementing AYP Consequences in Charter Schools*). These consequences fall into three categories: School Improvement, Corrective Action and Restructuring.

The first stage of AYP accountability is *School Improvement* and it has two phases. In the first year of School Improvement, the school must develop and implement a “School Improvement Plan” that identifies specific actions for improving a school’s performance. Furthermore, parents are entitled to transfer their child to another, better-performing school (this is called Public School Choice).

It is important to note that the Public School Choice provision of NCLB is an area of the law in which charter schools don’t fit neatly. The theory behind Public School Choice is that parents ought to have the right to transfer a student in a low-performing school to a higher performing one. This is an option that school districts, that typically have more than one school in their jurisdiction, can offer to parents

more easily than charter schools that are typically stand-alone, independent schools. As schools of choice, parents decide to send their child to a charter school so offering Public School Choice to charter school parents may mean notifying parents of their right to return to their local school district (a right that charter parents, no matter if the charter is low-performing or not, can always exercise.) Furthermore, charter schools may enter into arrangements with local and neighboring school districts to offer their parents additional schooling options.

If the school misses AYP for a another consecutive year, it enters the next phase of School Improvement, in which parents who elect to keep their child in the underperforming school are entitled have the child receive, at no cost to them, federally-funded Supplemental Educational Services (SES), such as tutoring.

Many states have developed specific requirements for offering SES in schools identified for improvement, including the use of state-endorsed SES providers. Authorizers should be familiar with the SES requirements in their jurisdiction and ensure the charter schools they oversee adhere to such requirements.

In the fourth consecutive year of missing AYP, the school moves into what NCLB calls *Corrective Action*. The Corrective Action stage requires a school to make substantial changes to its program, such as:

- Replacing the school staff that are relevant to the failure to make AYP;
- Instituting and fully implementing a new curriculum, including providing appropriate professional development for all relevant staff that is grounded on scientifically-based research and offers substantial promise of improving educational achievement for low-achieving students and enabling the school to make AYP;

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- Significantly decreasing management authority at the school, perhaps by hiring an educational management organization to operate the school;
- Appointing an outside expert to advise the school on its progress toward making AYP, based on its school plan;
- Extending the school year or school day; or
- Restructuring the internal organizational structure of the school.

If the school doesn't make AYP for a fifth year, it enters the *Restructuring* phase. Under Restructuring, the school must plan for and then, in the following year, execute fundamental changes in its program and the governance of the school, including:

- Reopening the school as a charter school;
- Contracting with an external provider to manage a school;
- Replacing staff and leadership;
- Turning the school's operation over to the state; or
- Engage in some other kind of restructuring.

Again, the Restructuring phase of NCLB is another area that doesn't fit the charter school model neatly. For example, what would it mean to restructure a charter school into a charter school? It is clear that Restructuring implies making fundamental changes to a school's governance and operations structure which may require a complete "makeover" of the school. And, as the ability to close a charter school that is producing results is a core component of the charter school accountability structure, another real option for "restructuring" a charter school is to not renew or revoke the school's charter, and thus require it to close.

In sum, authorizers must fully understand the specific actions NCLB requires schools not making AYP to take and act accordingly with schools in their portfolio that are subject to NCLB's accountability consequences.

Applying AYP Accountability to Charter Schools and Authorizers

The NCLB statute does not actually say much about charter schools. It states: "The accountability provisions under this Act shall be overseen for charter schools in accordance with State charter school law."³ In other words, the Act defers to the states to decide how to ensure charter schools comply with NCLB accountability requirements. That is a very broad directive, and in order to provide more clarity to charter schools and authorizers, the U.S. Department of Education (the Department) has issued non-regulatory guidance that elaborates on the oversight issue.

Although the Department has not historically offered non-regulatory guidance in connection with federal education laws, it has liberally issued such guidance to flesh out various aspects of NCLB. It is important to understand that guidance is a helpful tool and essentially establishes the Department's position on "best practices" in a particular area, but that guidance does not have the force of law, or even the authority of more formally adopted Department regulations. In some of its NCLB guidance documents the Department notes that the Department and the Office of the Inspector General will consider entities that follow the approaches contained in the guidance "to be in full compliance with the applicable Federal requirements..."⁴ But the Department also points out elsewhere in its guidance that, despite the information contained in such guidance, "[s]tate and local [entities] are free to implement [NCLB] activities based on their own reasonable interpretations of the law."⁵

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In the absence of anything more specific in the statute or regulations, non-regulatory guidance has, however, taken on an authoritative role in the implementation of NCLB and appears to establish a rule. It is not clear, though, whether the Department will enforce such "rules" and, if it did, whether courts would uphold them.

That said, the Department has issued very specific non-regulatory guidance that clarifies its position on how NCLB's AYP requirements apply to charter schools, and the role of charter school authorizers in that process. To date, particularly useful information has appeared in two sets of non-regulatory guidance – "Non-Regulatory Guidance: The Impact of the New Title I Requirements on Charter Schools, July 2004" (Charter School Guidance) and, more recently, "Non-Regulatory Guidance: LEA and School Improvement, July 21, 2006" (LEA Guidance). These two resources provide significant guidance on both the applicability of NCLB accountability to charter schools and the responsible oversight authority of NCLB accountability in charter schools.

Authorizers Are Responsible for Enforcing NCLB Accountability in Charter Schools

The Department's guidance states that charter school authorizers are primarily responsible for enforcing NCLB accountability (including AYP accountability) in the charter schools it oversees, unless state law gives that responsibility to another entity (such as a district or the

state).⁶ So far, no states have elected to reassign that responsibility, so to the extent that guidance has the authority to impose such an obligation, oversight responsibility remains with charter school authorizers.

Charter Schools are Treated Like Schools Under NCLB Accountability

Another important determination made in the Charter School Guidance that impacts the authorizer's role in AYP oversight relates to the status of charter schools themselves under NCLB.

NCLB has certain rules that apply to Local Education Agencies (LEA) – a.k.a. a school district – and others that apply schools. The distinction between the two is clear in the traditional system – the school district is the LEA and the schools within the LEA are schools. It is, however, more convoluted for charter schools where state charter school law determines if a charter school is its own LEA, part of a LEA or is its own LEA most, but not all of the time (for example, for special education or access to federal entitlement funding.)

So, what set of NCLB rules – those for districts, schools, or both – apply to charter schools? The Act doesn't say, so the Department takes a position through its Charter School Guidance. It states that charter schools should be treated like schools – and not like districts– for purposes of NCLB accountability. Such a rule not only takes away the ambiguity left by the Act as to which set of rules would apply, but adopts a rule that facilitates oversight by the authorizer.

Authorizers Step Into the Shoes of the LEA for Purposes of NCLB Charter School Accountability

The Charter Guidance elaborates on the sort of oversight the Department believes is appropriate when it comes to charter schools, authorizers, and NCLB accountability. It states that authorizers should essentially “step into the shoes” of the LEA.⁷ That is to say, charter authorizers should perform the same oversight functions performed by LEAs under the Act. This requirement applies to both charter schools considered under state law to be schools within a LEA and to those that are considered independent LEAs.

Practically speaking, being designated as the party responsible for charter school AYP accountability will matter most to authorizers that do not already have such obligations – that is to say, authorizers that are not local school districts. As LEAs, local school districts bear general NCLB oversight responsibility for regular district schools, so adding a few charter schools to that task ought not change their role substantially. For independent charter school authorizers – such as institutions of higher learning or non-

for-profit organizations– the situation may be very different. Such authorizers are likely to have no other LEA responsibilities, yet the Charter Guidance appears to require that they serve that role when it comes to NCLB accountability in charter schools.

We turn then to the question of what does stepping into the shoes of the LEA entail, particularly for AYP accountability?

Identify Schools for Improvement

Under the Act, LEAs have responsibility for identifying as “in need of improvement” those schools that have failed to make AYP for two consecutive years.⁸ In other words, NCLB gives LEAs the job of determining which schools are in trouble under NCLB's accountability rules. As discussed above, schools identified as in need of improvement that receive Title I funding are required to take implement a series of consequences. To the extent that they have to make such an identification, charter authorizers will need to closely track the performance of the schools they oversee and may need to work closely with their state education agency (SEA) to obtain the data required to make an AYP determination (the Charter School Guidance recommends that authorizers do exactly that).⁹

This is an important area, however, where the legal backdrop and actual practice differ substantially. While the law and guidance indicate that the LEA should determine AYP status, states have generally taken on that job themselves. In fact, most state NCLB accountability plans establish that the state education department will review school performance data and inform LEAs about the AYP status of all schools.¹⁰ Where this is the case, LEAs, and charter authorizer stepping into the shoes of LEAs, will not need to make – nor should they independently make – AYP determinations.

Instead, authorizers should pay close attention to their state education department's determinations on the AYP status of the schools it oversees. Charter authorizers will be most effective when they are in close contact with state authorities and work collaboratively with them to implement accountability measures.

Identify the Process By Which a School Can Appeal Its AYP Status

Once a school is identified as in need of improvement, the school has 30 days in which to challenge that designation and show that it is mistaken.¹¹ The process for appeal is not defined in the Act and so will vary state to state. Authorizers acting in an LEA capacity should be aware of this rule and be ready to promptly consider any such appeal, presumably through a process designed and implemented by the SEA.

Notify Parents of a School's "In Need of Improvement" Status

LEAs must, according to the LEA Guidance, promptly notify parents of students in schools missing AYP to explain: the school's status and the reasons behind it; parent involvement options; the availability of school choice and related transportation considerations and the availability of Supplemental Education Services (SES). The guidance directs the LEA, and therefore the authorizer stepping in the shoes of the LEA, to issue such letters directly, rather than simply ensuring that schools send the letters themselves. The letters should be tailored to the status of the particular school – such as School Improvement, Corrective Action or Restructuring, and describe what that status means, the reasons for the school's status and the roles parents can play in addressing the problem (such as transferring their child to different school or securing SES).

Notify Parents and the Public on Steps Being Taken to Remediate Schools Identified as "In Need of Improvement"

For schools identified as in need of improvement, LEAs must notify parents and the public of steps being taken to correct the school's overall performance problems by publishing and disseminating information on the steps the school is taking to address the problem and the steps the LEA and SEA are taking to help the school address the problem.¹²

Authorizers may want to draft and disseminate a general statement that addresses not only the problems the school faces but the positive steps being taken and planned. This notice is separate from the individual notice to parents described in the previous section.

Ensure that School Improvement Steps are Taken

According to the LEA Guidance, it is the responsibility of the LEA to ensure that Public School Choice and SES (as well as any other measures required in the School Improvement Plan) are offered by the underperforming school where required.¹³ Authorizers stepping into the shoes of the LEA in this regard need to establish a process for communicating with the charter schools they oversee and for ensuring that the proper measures are in place.

With this in mind, authorizers should consider including in charter contracts provisions specific to NCLB accountability requirements. This may include contractually requiring schools to implement NCLB accountability requirements and setting specific actions the authorizer will take against the school for failing to comply with NCLB. Such contractual provisions give authorizers an additional tool to use in ensuring that NCLB consequences

are actually implemented. For example, a charter school that is failing to provide required SES to eligible students could be warned by its authorizer that it risks probation or other disciplinary action not only for general disregard of applicable law, but for a substantive violation of the charter as well.

Ensure Schools "In Need of Improvement" Receive Technical Assistance

An important aspect of NCLB's accountability regime is the requirement that technical assistance is provided to under-performing schools by the LEA and supported by statewide Title I funds. Essentially, schools struggling to make AYP are assured that they will receive assistance in remedying their performance problems.

"Technical Assistance" is described in the Act as practical advice offered by an expert source that is aligned to the school's Improvement Plan. NCLB states that LEAs can either provide such assistance directly or outsource that task to a third party. According to the LEA Guidance, LEAs must ensure that a school in need of improvement receives technical assistance during the development of the School Improvement Plan and ultimately approve it.¹⁴ NCLB makes it clear that technical assistance may be made available for three purposes – to improve the instructional program; for the identification and implementation of effective strategies; and for budget analysis.¹⁵

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The Department's plan for implementing technical assistance, as laid out in its guidance, requires the LEA to take the lead in providing such assistance – either directly or by contracting with a competent provider. This is likely to require LEAs, and authorizers filling that role, to be proactive in letting under-performing schools know that such help is available and how to access it. It is important to note that neither LEAs nor the schools themselves are obligated to fund this process – NCLB requires states to reserve 5% of their overall Title I funding for technical assistance. States are permitted to retain up to 1% of those funds for their own administrative costs in carrying out this process, but are expected to pass along the rest to LEAs for the purpose of providing technical assistance.¹⁶ States are also supposed to develop a state-wide system of technical assistance support,¹⁷ and are expected to step in to ensure that such assistance is provided if the LEA (or authorizer acting as an LEA) fails to provide it.¹⁸

Authorizers may prefer a hands-on approach to technical assistance – directly providing budget analysis, help building effective strategies and re-tooling the instructional program. Handling this work directly could allow an authorizer better insight into the status of an underperforming school and greater impact over efforts to improve it. But providing such offerings may also require substantial staffing and resources that many authorizing offices do not have and may cross the line from overseer to support provider that some authorizers are simply not comfortable crossing. A more modest solution would be for authorizers to contract with 3rd party providers and pay for those services with the funds reserved by the state for technical assistance. Practically speaking, authorizers in many locations may need to educate state authorities about the requirement that they pass along technical assistance funds. The footnotes to this section should provide adequate authority for seeking such funds.

Key Considerations for Charter School Authorizers

Given the legal backdrop described above, charter school authorizers should make sure that they have in place the information and practices they need to effectively oversee AYP accountability in the schools for which they have responsibility.

Assuming that the Department's non-regulatory guidance establishes the ground rules for charter school authorizer accountability, authorizers, at a minimum, should:

- Have a solid understanding of AYP and other relevant aspects of NCLB;
- Determine the Title I status of the schools for which they have oversight authority;
- Understand their state's approach to NCLB – especially as it relates to AYP. The basics of this approach is set forth in the state's accountability plan (also called an Accountability Workbook) which are available on the internet at www.ed.gov/admins/lead/account/stateplans03/index.html;
- Determine who (authorizer or state) notifies charter schools about their AYP status, and how that process works;

- Identify the appeals process for schools wishing to challenge their AYP designation (either creating their own in the case of the authorizer making AYP determinations or utilizing the process established by the state);
- Establish a clear system for communicating about AYP status to each school, for tracking AYP status, and for taking appropriate actions;
- Notify parents of students in schools identified for School Improvement explaining the status of the school, reasons for identification and their rights with respect to interventions;
- Issue a general notice to parents and the public about any school for which they oversee that is identified for School Improvement, Corrective Action or Restructuring that describes the steps that will be taken to address the problem;
- Develop a plan for providing technical assistance to underperforming schools; and
- Ensure that School Improvement, Corrective Action and Restructuring measures are actually implemented by underperforming schools.

Conclusion

The process of approving, overseeing and evaluating charter schools is no small task. Yet, entities, ranging from universities to school districts, from mayor's offices to non-profit organizations, have gladly accepted this role in public education because of the belief that it will make a difference in the lives of children.

With the passage of the No Child Left Behind Act, the responsibilities of authorizers overseeing the nation's 4,000+ charter schools expanded even further as the responsibility of enforcing NCLB accountability in charter schools falls square on the shoulders of authorizers. Thus, authorizers must be fully knowledgeable of the responsibilities that NCLB places both on authorizers and charter schools and be fully equipped to ensure these obligations are met.

AUTHORIZER CHECKLIST: IMPLEMENTING NCLB CONSEQUENCES IN CHARTER SCHOOLS

For schools that receive Title I funds and have not made AYP for two consecutive years in the same subject:

- ☐ Has notification been sent to parents explaining the school's AYP status?
- ☐ Has the school developed a School Improvement Plan for increasing student performance?
- ☐ Is the school implementing the School Improvement Plan?
- ☐ Is the school offering public school choice?

For schools that receive Title I funds and have not made AYP for three consecutive years in the same subject:

- ☐ Has notification been sent to parents explaining the school's AYP status?
- ☐ Has the school revised its School Improvement Plan for increasing student performance?
- ☐ Is the school implementing the School Improvement Plan?
- ☐ Is the school offering public school choice?
- ☐ Is the school offering eligible students supplemental services?

For schools that receive Title I funds and have not made AYP for four consecutive years in the same subject:

- ☐ Has notification been sent to parents explaining the school's AYP status?
- ☐ Has the school revised its School Improvement Plan for increasing student performance?
- ☐ Is the school implementing the School Improvement Plan?
- ☐ Is the school offering public school choice?
- ☐ Is the school offering eligible students supplemental services?
- ☐ Is the school implementing one or more corrective actions?

For schools that receive Title I funds and have not made AYP for five consecutive years in the same subject:

- ☐ Has notification been sent to parents explaining the school's AYP status?
- ☐ Is the school offering public school choice?
- ☐ Is the school offering eligible students supplemental services?
- ☐ Is the school implementing one or more corrective actions?
- ☐ Are plans to "restructure" the charter school being developed?

For schools that receive Title I funds and have not made AYP for six consecutive years in the same subject:

- ☐ Has notification been sent to parents explaining the school's AYP status?
- ☐ Is the school offering public school choice?
- ☐ Is the school offering eligible students supplemental services?
- ☐ Is a plan for restructuring the school being implemented?

RESOURCES

The following resources may be useful to authorizers seeking better understanding of NCLB and its accountability requirements.

The No Child Left Behind Act of 2001 (20 U.S.C. 6301) www.ed.gov/policy/elsec/leg/esea02/index.html

NCLB Non-Regulatory Guidance, generally www.ed.gov/policy/elsec/guid/list.jhtml

Charter Schools Non-Regulatory Guidance

www.ed.gov/policy/elsec/guid/charterguidance03.pdf

LEA and School Improvement Non-Regulatory Guidance

www.ed.gov/policy/elsec/guid/schoolimprovementguid.doc

Charter Schools Program Non-Regulatory Guidance

www.ed.gov/policy/elsec/guid/cspguidance03.pdf

ENDNOTES

¹ NCLB requires the student performance data be disaggregated and reported by the following the following student sub-groups: disability; race and ethnicity; limited English proficiency and poverty.

² It is important to note, though, that even schools that do not receive Title I funds may still be required to comply with NCLB accountability as some states have opted to extend its reach beyond Title I schools and may subject non-Title I schools to the same consequences as Title I schools. Thus, it is important to be aware of the local regulatory environment to know to which schools NCLB accountability applies.

³ NCLB § 1111(b)(2)(k)

⁴ Public School Choice Guidance, February 6, 2004, Introduction.

⁵ Non-Regulatory Guidance: Improving Teacher Quality State Grants, Title II, Part A, August 3, 2005, “Purpose of This Guidance” section.

⁶ Charter School Guidance, at A-2.

⁷ Charter School Guidance, at A-4.

⁸ NCLB § 1116 (b)(1); §1116(b)(2). Note: Most states require that failure to make AYP must be in the same subject for two consecutive years in order to trigger accountability.

⁹ Charter School Guidance, at A-2.

¹⁰ State Accountability Workbooks are available on the U.S. Department of Education’s website at <http://www.ed.gov/admins/lead/account/stateplans03/index.html>.

¹¹ NCLB § 1116 (b)(2).

¹² NCLB § 1116(b)(6); NCLB Regulations § 200.38; LEA Guidance B-7.

¹³ LEA Guidance B-9 and E-4.

¹⁴ LEA Guidance at C-18

¹⁵ LEA Guidance at D-2; see also NCLB § 1116(b)(4); NCLB Regulations § 200.40 (c)(1).

¹⁶ NCLB § 1003(b); Guidance D-6

¹⁷ LEA Guidance at D4-D5

¹⁸ NCLB Regulations § 200.49(d); LEA Guidance at D-15.



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